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No. 79-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC CO.,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

Appeal From The Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellants.

The National Association of Manufacturers (NAM) is incorporated under the laws of the State of New York as a non-profit voluntary business association. NAM represents approximately 12,000 members engaged in manufacturing and related businesses, whose employees comprise an estimated 78% of the nation's manufacturing work force. NAM members are engaged in a wide variety of land and resource based activities, including forest

products, coal, oil and gas, hard rock minerals, water resource development, agriculture, and land development and building. Members are located in all 50 states, in urban, suburban and rural areas. NAM members have a large stake in the stewardship of land and resources and are deeply concerned about government encroachments on the use of land and resources.

ARGUMENT

THERE IS A VACUUM OF LEGAL PRINCIPLE IN THE FIELD OF INVERSE CONDEMNATION THAT DESPERATELY NEEDS THIS COURT'S ATTENTION.

The past decade has witnessed a "regulatory explosion." Sometimes, even a single regulation deprives a land owner of the use of his property. Certainly, when taken together, interrelated or overlapping regulatory activity often effectively prohibits all reasonable or economically viable use. NAM respectfully urges that the "taking issue"—both in its substantive and remedial aspects—is ripe for definitive, analytical treatment by this Court. The *ad hoc,* case by case approach favored by this Court thus far [1] has with the passage of time led to a situation in which predictability has been sacrificed to flexibility to such an extent that neither private nor public parties across the Nation are able to ascertain what their rights are without first litigating through the highest appellate levels. This is wasteful of the parties' and courts' resources, and in some parts of the country has inspired chaotic conditions.[2]

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[1] *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 123-124 (1978).

[2] Two noted commentators have aptly termed the situation "a synergistic nightmare, a paralyzing mishmash", and a "bubbling cacophony of multitudinous edicts". Hagman and Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in The Land Markets,* The Real Estate Appraiser, Sep.-Oct. 1974, at p. 7.

The avowed *ad hoc* nature of such law as exists merely provides incentives to further litigation as both sides to this controversy press their causes on the courts in an effort to reduce to precedent the infinitely variable facts of each individual dispute. To be sure, the flexibility employed by the Court thus far, has much to commend it, but on the other hand, the nation desperately needs definitive constitutional guidance from this Court as to where flexibility ends and guiding precedent begins.

Moreover, the traditional mechanisms of land use regulation have undergone a revolutionary change in the last decade. The notion of yore that construction of improvements on land need only be preceded by compliance with zoning ordinances and building codes, and issuance of a building permit, has by now joined such venerable images as the hand-cranked automobile. It would impermissibly swell this brief to provide even a thumbnail sketch of the details of today's regulations. Suffice it to say that in some portions of California as many as a dozen permits may be required before a landowner may construct a single family dwelling for his own use.[3] In the case of larger scale projects, the regulatory travails become mindboggling, with literally scores of permits from scores of agencies required, all resulting in an economic nightmare that at times not

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[3] In the aftermath of this Court's decision of *Agins* v. *City of Tiburon*, —— U.S. —— [65 L. Ed. 2d 106] (1980), a knowledgeable commentator noted that it would have cost Mr. and Mrs. Agins some $50,000 to apply for permission to build, "[a]nd spending that sum would not have necessarily gotten them permission to build five houses. The answer to the question 'Simon, may I build?' might have been, 'Yes, but only one or two houses.' " Smith, *An Inverse Condemnation Puzzle: The Agins Case Lands in Limbo*, 2 Nat. L. Jour. (No. 2, Aug. 4, 1980, p. 52, at 53). That answer—it must be noted—might also have been "No, you can't build at all. We don't like your project".

even the nation's wealthiest enterprises can afford.[4] See *Owen* v. *City of Independence*, —— U.S. —— [63 L. Ed. 2d 673, 693, fn. 33] (1980).

Another vitally important element of the revolutionary change in land use regulation is the recent explosive balkanization of regulatory authority. No longer is one confronted with obtaining approval from a readily identifiable local regulatory entity. The historical dominance of this area by towns and counties has been diluted and overlaid by a layer cake of agencies that range all the way from state and regional bodies (such as the California Coastal Commission), all the way to bistate entities (such as the Tahoe Regional Planning Agency) and federal agencies. Along with these novel regulatory super-agencies, the land use regulatory process has also been honey-combed from the bottom, as it were, by a multitude of mini-authorities[5]

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[4] It is undoubtedly subject to judicial notice, in light of these events' enormous notoriety and (in one instance) public comments by the President of the United States, that such giants as Sohio, Dow Chemical, and Walt Disney were forced to abandon their plans for major projects in California, not because these projects were ever substantively adjudged to be illegal or environmentally "bad", but simply because not even these enterprises, for all of their Croesus-like resources, could bear the economic burdens of interminable regulatory maneuverings that after the expenditure of many millions of dollars and years of effort, produced no approvals, and only promised further consumption of time and money in pursuit of increasingly hydra-headed regulatory demands, with no prospect of resolution in sight.

[5] An excellent, if horrifying, example of such balkanization in action is *Department of Natural Resources* v. *Thurston County*, 601 P.2d 494 (1979, Wash.), now pending before this Court on appeal as *Lake Lawrence, Inc.* v. *Thurston County*, No. 79-1880, where a landowner found himself in the role of shuttlecock bouncing between different local agencies with diverse views as to what land uses would be permitted. Also see *Raley* v. *Calif. Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 984-985, 137 Cal. Rptr. 699 (1977) where the intermediate appellate court deplored the "administrative anarchy" but found itself powerless to grant relief because of California Supreme Court's rulings.

such as local wetlands and historical conservation districts, water and sewage districts, all the way down to something called a "neighborhood" (see Revised Charter of the City and County of Honolulu, 1973, Art. XIII, Sec. 13-101 et seq.). Finally, as if all that were not enough, it now seems clear that the people of a community, can simply take matters into their own hands, and by initiative or referendum vote to change the zoning of even a single lot in their community. See *City of East Lake* v. *Forest City Enterprises,* 426 U.S. 668 (1976).

It is not the purpose of this discussion to debate here the wisdom of such arrangements; the point rather is that governmental arrangements have necessary constitutional consequences, and legal approaches evolved in an earlier day frequently prove ineffective to protect constitutional rights, as those rights come under attack by techniques undreamed of when the basic principles of pertinent law were laid down more than a half-century ago. In short, just as this Court noted the need to recognize the changing social conditions in approving novel regulations (see *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 387 (1926)), so too, there is a correlative need to recognize that eventually the new regulations impact on society in ways unanticipated in the past. The problem which desperately needs attention from this Court is that these mushrooming regulatory powers must somewhere along the line be circumscribed by the vital concept of accountability to the Constitution. The traditional judicial deference to land use regulations needs to be balanced against constitutional values; eventually this facet of governance—like all others —must be recognized as having discernible limits, and the nation needs to be told what those limits are. See *Moore* v. *East Cleveland,* 431 U.S. 494, 513-514 (1977), Stevens, J., concurring. Great governmental powers without such limits invite abuses. For example, no sooner did the California Supreme Court decide *Agins* v. *Tiburon,* than Congressman Beilenson wrote to Los Angeles area

officials exhorting them to prevent private use of land that is contemplated for acquisition by the federal government, as the Santa Monica Mountains Park, asserting that such course of action was risk free. Similarly, on December 14, 1979, the General Accounting Office issued a report (No. CED-80-14) entitled "The Federal Drive to Acquire Private Lands Should be Reassessed", which *inter alia* urges that the government resort to restrictive zoning in lieu of acquisition, and that it rely on local governments' use of the zoning powers to accomplish effective conversion of private lands into public open space without paying for it.

The principal problem with current regulatory reality is that all too often the regulating is done by diverse entities with fragmented parochial interests. With their good intentions fueled by perceived (or at least professed) nobility of their socio-ideological goals (such as protection of the environment, urban aesthetics, historical preservation, growth control, etc.) they promulgate regulations that often stultify literally all economically rational use of stretches of land. The spector of American landowners being told to pay their taxes while simultaneously being denied any rational use of their property that would justify the values on which they are being taxed is not an exaggeration; it is a growing reality in many parts of this country.[6] These observations must not be understood as

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[6] Thus, California law is replete with cases in which landowners are driven into bankruptcy and foreclosure while being denied any economically rational use of their land. See e.g., *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti* v. *Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978), *Hollister Park Investment Co.* v. *Goleta County Water Dist.*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978); *Frisco Land & Mining Co.* v. *State*, 74 Cal. App. 2d 736, 141 Cal. Rptr. 820 (1977); *Klopping* v. *City of Whittier*, 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972), *County of Los Angeles* v. *Berk*, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381 (1980), now pending before this Court on Petition for Certiorari as No. 79-1950; *Toso* v. *City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), now pending before this Court on Petition for Certiorari as No. 80-205.

in any way derogating from the goals of good faith regulations intended to preserve for ourselves and for posterity the blessings of a wholesome environment. Rather, the point is that however commendable these ends may be, they must still be pursued by means that are respectful of the Constitution. To put it another way, one must not confuse the state police power with the power of a police state.

The blunt fact is that there are simply *no* readily ascertainable and pragmatically applicable legal criteria whereby one can gauge when all this burgeoning regulatory activity trenches on constitutionally protected rights.[7] An American citizen in one state finds that his supposed *federal* constitutional rights bear no resemblance to his fellow citizen's rights in other states.

A supposed "property" system in which the ostensible owner cannot tell what rights he "owns" until he tries to exercise them, and even then only after ruinously costly (and often pointless) administrative proceedings with a whole separate multi-tier appellate process, and only then ligitation in the courts, is an illusion. Only the most wealthy (and the most determined) persons can even try to seek protection of their constitutional rights. Such a system, moreover, is alarmingly akin to the feudal arrangement of medieval times, where only the king actually owned land, and everyone else merely "held of" him. See McGlaughry, *Farmers, Freedom and Feudalism: How to*

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[7] As the California Supreme Court conceded, the judicial patterns of distinguishing between "taking" and "police power" ". . . at best . . . have served as a shorthand method of indicating the result . . .", *HFH, Ltd.* v. *Superior Court*, 15 Cal. 3d 508, 522, 125 Cal. Rptr. 365, 542 P.2d 237 (1975). Surely, the institution of property and the constitutional values inherent in it (see *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972)), are entitled to a greater degree of judicial protection than such semantic manipulation.

Avoid the Coming Serfdom, 21 S.D. L. Rev. 486 (1976). History teaches that such a system inevitably leads to social polarization and class friction (as the politically connected haves enjoy the "royal" favor at the expense of the have nots). After all, as this Court astutely observed in *Willow River Power Co.* v. *United States,* 323 U.S. 499, 502-503 (1945), "property rights" are only those economic advantages which the law will protect. Disabling one from being able to tell what the law will protect (and worse, *de facto* removing such legal protection, while paying lip service to it), effectively destroys the very idea of property. The *Willow River* concept of legally protected economic advantage is thus *de facto* transmogrified into a system in which the legal protection of economic advantage flows not from neutral legal principles, but from the practically unreviewable whim of a local (often parochially-minded and politically inspired) regulatory body. Bearing in mind that "property" is not the physical object but the group of rights that attaches to it (see *United States* v. *General Motors Corp.,* 323 U.S. 373, 377-378 (1945)), a dilution of such rights to the point of their practical unavailability, also accomplishes a *de facto* transfer of those rights to the government (see *Id.* at 378). This is particularly true of the right of user; if one's right to use one's property is gone, virtually nothing is left, save the dubious privilege of paying taxes and bearing other economic burdens of property ownership. Appellee's position ultimately means that there are *no* property rights in the land, except to the extent the local regulators choose to create them by issuance of a permit.

A RATIONAL AND FAIR SYSTEM OF REMEDIES FOR TAKINGS MUST INCLUDE JUST COMPENSATION TO BE EFFECTIVE AND SOUND.

No constitutional guarantee, however basic and noble, can have meaning unless it is not only enforceable, but also enforceable in an effective fashion. Just as this Court has recognized the basic need for flexibility in making determinations of whether takings have occurred, so too there ought to be embedded in the law flexibility in providing remedies. Sometimes, invalidation may be what is needed; at other times, however, just compensation may be the only remedy that will make the owner whole—indeed, it may be desirable from the government's point of view where major policies are pursued by the challenged regulations.

Thus, the arguments of Appellee that would establish an absolutist dogma forbidding payment of just compensation in all cases of regulatory takings, irrespective of circumstances or of the economic impact on the aggrieved owner, warrant rejection out of hand. This conclusion is both pragmatic and finds support in this Court's unbroken chain of decisions dealing with remedies for takings: *Hurley* v. *Kincaid,* 285 U.S. 95 (1932); *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Fresno* v. *California,* 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Also, see *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 752-753 (1950) (taking effected by state police power measure gives rise to right to just compensation, even though invaded right not protectible by injunction).[8]

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[8] For a fuller discussion of *Gerlach* in the context of California law, see Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty,* 1980 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, p. 177, at 199-204.

A. This Court's Precedential Analysis Favors Just Compensation as a Remedy.

Both in terms of holding and rationale, *Hurley* v. *Kincaid, supra,* is well nigh dispositive. The Court's rejection of the owner's attempt to secure a non-monetary remedy is both clear and logical. Of particular interest is the Court's reasoning that proceeds from the premise that the Act in issue there was valid[9] (285 U.S. at 103), and once that is established, the question becomes whether the owner's constitutional rights are protected when just compensation is provided, or whether the whole law must fall because of lack of compensation. Mr. Justice Brandeis' answer to that question in *Hurley* is difficult to quarrel with: the owner's grievance in such cases is *not* that the government takes his land, but rather that the taking has not been accompanied by compensation. In other words, it is the lack of compensation that offends the constitution, not the taking, for the latter is an inherent power of government that exists independently of the Constitution which only imposes conditions to its exercise (*Miss. & Rum River Boom Co.* v. *Patterson,* 98 U.S. 403, 406 (1878)). It follows, therefore, that if compensation is provided by the courts (whether at the government's or the owner's behest) the flaw in the governmental action is cured, and there is no illegality (see 285 U.S. at 104).

B. Appellee's Notion Whereby Courts Would Have to Invalidate Legislation as the Measure of First Resort is Unsound and Contrary to Settled Principles of Constitutional Jurisprudence.

Nor did *Hurley* stop there; it went on to note:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental

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[9] While in *Hurley* this was conceded, it is basic that validity of a law cannot be made dependent on a citizen's concession.

> ends, a court of equity acts with caution and only upon a clear showing that its intervention is necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That observation, of course, puts its finger on the heart of pertinent policy considerations: it would be most improvident to structure a remedial rule that would require the courts *as a constitutional imperative* to strike down potentially vital governmental programs or regulatory schemes, merely because they impacted on an affected property owner so as to deprive him of a "stick" in his property rights "bundle". *The Regional Rail Reorganization Act Cases, supra,* provide an excellent example of the hazards inherent in Appellee's theory. Had such a theory been applied there (as indeed it was by the trial court, only to be rejected by this Court) the upshot would have been an instant destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with eight major railroads in the throes of fragmented, individual bankruptcy proceedings, without a coherent system whereby to consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system. While the case at bench does not present the Court with such calamitous prospects, it should not serve as a vehicle for the formulation of such a constitutional imperative that in future applications would compel judicial destruction of major regulatory schemes that some day may be vital to national survival.[10]

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[10] This is no hyperbole. Surely, it takes no claim of clairvoyant powers to visualize various governmental regulatory responses to the difficult problems of energy and inflation, for example, that in application may trench on constitutionally protected property rights. Should that occur, which would be better public policy: to require the benefited public to pay only for those limited private rights destroyed in the process of thus bettering the public condition, or to declare such programs invalid, with possibly calami-

As Mr. Chief Justice Marshall enduringly put it:

> 'The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland,* 4 Wheat. 316, 415 (1819).

Appellee's thesis, that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, ignores the socio-political gravity of judicial intervention in the workings of a tri-partite government. When the judiciary invalidates a legislative enactment it is a measure of last—not first—resort. The judicial power to invalidate is a historically rooted power of "strict necessity" (*Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568 (1947); *Spector Motor Service* v. *McLaughlin,* 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U.S. 129, 136 (1946)). See *Rescue Army* v. *Municipal Court, supra,* 331 U.S. at 571-572.

Appellee's theory seems preoccupied with short-range provincial concerns of local governmental interests. Its endorsement by the court below ignores the grave strain that judicial invalidation of legislation imposes on the

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tous consequences? As the Court of Claims astutely noted in *Drakes Bay Land Co.* v. *U.S.,* 424 F.2d 574, 587 (1970 Ct. Cl.), where the "convergent pressures" of desired governmental objectives and governmental unwillingness to pay for what is needed impact on the property owner caught in the middle, it is recourse to inverse condemnation that ". . . has saved the day in many another sticky situation".

social fabric. The holding below improvidently fashions a rule that would have the judiciary impose constraints on what the legislature may or may not enact, not in the historical context of major, earthshaking policy decisions that have confronted the nation on occasion and thereby made occasional legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case adjudications of purely local (usually political) decisions involving what in policy terms are but insignificant patches of land. Appellee's approach would make the judiciary an ongoing supervisor of the local legislative branch; it would make this Court the Supreme Board of Zoning Appeals.

Legislative approaches to solution of social problems are inherently more flexible and democratic, and judicial delimitations of the legislative power should be created rarely and cautiously. It is the legislatures that are called upon to provide immediate responses to social needs of the moment, and legislators are more readily responsive and accountable to the public will. This is as it should be in a democratically based society. To impose on such a system of governance a process of *ad hoc* judicial intervention of a ". . . largely negative character and [with] limited resources of enforcement" (*Rescue Army* v. *Municipal Court, supra,* 331 U.S. 571), would be most improvident. It seems by far the better policy to let the local legislators legislate, and when their enactments disregard the "just compensation" clause, and work a taking, it is singularly appropriate that they—as the branch of government responsible for the public purse, both in terms of revenues and expenditures—should be called upon to face up to the economic consequences of their own informed decision making, and (under appropriate circumstances) to pay for that (and only for that) which their solemn action took from a private owner. See *U.S. Trust Co.* v. *New Jersey,* 431 U.S. 1 at 29, fn. 27. In the long run, that approach is certain to enhance the quality

of legislative cost/benefit analyses, and to provide incentives to local governmental entities' clear recognition of the distinction between municipal necessities, social amenities, and outright luxuries.[11] This is a sound policy for rich and poor alike; yet it must be noted that such considerations are *a fortiori* pertinent here, when one recalls that San Diego is without a doubt one of the most prosperous communities in the state; it is already blessed with ample environmental resources, and can undoubtedly well afford any reasonable amount of parklands for its inhabitants.

In sum, sound, time-tested reasons of public policy respectful of the doctrine of separation of powers, counsel against the judiciary's, too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis. Legislatures know best what their constituencies need and what they can and cannot afford, and no sound reason appears why the courts should be called upon to assume a paternalistic role in this peculiarly legislative area of fiscal decision making.

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[11] Every municipality needs transportation, and every one owns automobiles for that reason. Yet no one has ever suggested that a municipality should have the power to exact Cadillacs from local car dealers when the municipal budget only allows for Fords, or to commandeer the free use of any citizen's car instead of buying one. No reason appears why similar reasoning should not apply to a municipality's real property needs and desires; as Mr. Justice Holmes observed in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), where a community has been so shortsighted as to fail to acquire enough for its needs [as determined by it], no reason appears why the courts should step in and supply the desired additional increment of social benefit gratis, any more than they supply any other community resources. Accord, *Griggs* v. *Allegheny County*, 369 U.S. 84, 89-90 (1962), (a community that constructs a bridge or airport without adequate approaches is not entitled to acquire them gratis by a claim that it is "regulating").

C. Obedience to the Constitution is No Less Worthy in Land Use Cases Than in Others.

It is often argued in cases of this type that regulatory bodies supposedly face a dilemma: they must regulate to meet the needs of the times, but they cannot tell when their edicts trench on constitutional rights. The implication is said to be that this asserted difficulty somehow earns them the right to become the beneficiaries of judicial rescue operations, to keep them from having to face the economic consequences of their own informed and pre-eminent decision making. This, with all due respect, is a false dilemma. If the regulators are astute enough to select and pursue their chosen governmental ends, they should also be responsible enough to select appropriate means. As this Court pointedly noted in *International Paper Co.* v. *United States,* 282 U.S. 399, 406 (1930):

> "The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late."

Moreover, such arguments defy the Constitution's primacy. Consider this: every day, in some dark alley, a young policeman with limited experience and perhaps only a high school education, is being called upon to make instant decisions "on his feet" under potentially dangerous circumstances, that ultimately impact on the constitutional rights of the suspect that faces him. Yet, the courts have never hesitated to make it clear that the constitutionally protected rights of persons (including such suspects) are paramount, and therefore such policemen simply have to learn the contours of constitutionally permissible behavior, however difficult that may be. How then can it be seriously argued that a municipal regulatory establishment that enjoys the benefit of a full panoply of governmental powers and resources, aided by a staff of experts, receiving ample legal advice every step of the way, and

taking years to accomplish its regulatory objectives, cannot tell constitutional right from wrong and must be excused if it violates the constitutional rights of those it deals with? Such an image simply won't wash.

D. Constitutional Rights Need Protection Against Chilling by Governmental Overreaching.

It is also argued in such cases that if just compensation is required for egregious violation of constitutional property rights, that will "chill" even the benign exercise of regulatory powers. This, like most "parade of horribles" arguments, is a bit shopworn, and has already received short shrift from this Court.[12]

Moreover, this latter-day notion of "chilling' stands logic on its head. The concept of "chilling" rests on the idea that the rights protected by the Constitution are so precious that the courts protect them not only from outright invasions, but also from governmental activities that, though not crudely violative of the constitutional letter, would in reality tend to discourage individuals from availing themselves of those cherished rights. *That* is what "chilling" is all about.

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[12] ". . . [V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson* v. *Memphis*, 373 U.S. 526, 537 (1963). See *Gates* v. *Collier*, 501 F.2d 1291, 1319-1320 (1974, 5th Cir.). As one noted commentator put it:

> "At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore the year before much too long ago." Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 620 (1961).

To argue in favor of standing this concept of "chilling" on its head, and to demand that the constitutional values be narrowly circumscribed, lest those who would violate them be "chilled",[13] is simply an Orwellian inversion of the English language. The ethical and logical basis on which the concept of "chilling" rests means to protect the individual citizen from constitutional overreaching by the powerful government, not the other way around (history teaches that governments tend to take care of themselves). It is indeed supposed to provide disincentives *to the government* when it sets out on a constitutionally suspect path. Confronting a would-be constitutional violator with the prospect of unpleasant consequences is not "chilling"—it is deterrence from wrongdoing. See *Owen* v. *City of Independence, supra* [63 L. Ed. 2d at 694], *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 407-408 (1971), Harlan, J., concurring.

It would be an anomalous twist, contrary to the spirit and two centuries of American constitutional jurisprudence, to say that constitutional violations should be encouraged, lest their discouragement work a "chilling" of those who would set out on a path of collision with the nation's organic law and the precious values it enshrines. As this Court observed in *Owen,* the law should provide incentives such that errors in municipal judgment should be on the side of protection of citizens' constitutional rights, not in their derogation [63 L. Ed. 2d at 694].

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[13] It must be emphatically noted that no one on Appellee's side worries about any supposed "chilling" in the context of invalidation; it is only when it comes to having to pay just compensation that the bogus tocsin of "chilling" rings out. That tells volumes; the commitment of the parties making such arguments is thus *not* to the Constitution, but only to their self-interest (i.e., to a remedial legal structure that would make constitutional violations convenient, risk-free, and above all cheap).

E. Availability of the Just Compensation Remedy Makes Judicial Response to Takings More Capable of Doing Individual Justice to Both the Aggrieved Citizen and the Government.

Finally, beyond the above considerations, there are additional sound policy reasons that favor just compensation as a remedy. If the regulating entity effects a taking and confronts monetary liability, it has several ameliorating options available to it. It can, for example, in those situations where a full irreversible taking has not been effected, amend the regulation so as to avoid the continuing constitutional violation, while preserving its proper regulatory objectives to an optimal degree. See *U.S. Trust Co.* v. *New Jersey, supra,* 431 U.S. at 29-30. In such cases, this reduces liability to compensation for a temporary or partial taking. Even assuming the worst possible scenario from the regulating entity's point of view (i.e., those situations where the courts find the invasion of private property rights to be so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset [14] whose acquisition axiomatically betters the public condition. Moreover, if the municipality should decide that the asset thus acquired is indeed beyond its means (or, more accurately, beyond its *willingness* to acquire), it would have the further option of changing its mind and selling the land thus involuntarily acquired.[15]

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[14] In other words, for its money, the municipality acquires its equivalent in the form of land whose price is judicially determined as being its fair market value.

[15] This idea is hardly novel. It is now authorized in cases of so-called excess condemnation, whereby under some circumstances a public entity condemns more land that it will use for the public project (see Cal. Code Civ. Proc. § 1240.430). Such excess acquisition may occur because the government desires it (see *United States ex rel. TVA* v. *Welch*, 327 U.S. 546 (1946), *People* v. *Superior Court*, 68 Cal.2d 206, 65 Cal. Rptr. 342, 436 P.2d 342 (1968)), or because the owner does (see Cal. Gov't. Code § 7267.7, 42 U.S.C. § 4651(9)). Either way, resale of land acquired by the government

Indeed, Cal. Gov't. Code § 6952 expressly authorizes such resales of "open space".

It should go without saying, but unfortunately it is often the subject of contentious debate, that a finding of "taking" does *not* mean that the taking entity must acquire the full fee simple title to the property in question. What has been taken depends on the facts of each case; it may be a temporary taking,[16] a partial taking of only a subordinate property interest,[17] or, if the circumstances are egregious enough it may be a full taking.[18] But the governmental handwringing that one sees so often in these cases (of the tenor that even the slightest misstep over the constitutional line means an involuntary fee simple title purchase) is wholly without merit.

Such recognition of the proper role of compensation in the constitutional remedial scheme would further provide proper incentives and disincentives for municipal fine tun-

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is hardly unusual; indeed, it is an essential feature of urban redevelopment programs; see *Berman* v. *Parker*, 348 U.S. 26 (1954).

[16] *Lomarch Corp.* v. *City of Englewood*, 237 A.2d 81 (1968, N.J.)—regulation deemed a taking of one-year option to buy. *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814 (1975, Ct. Cl.) rev'd. 389 N.Y.S. 2d 895 (1976, App. Div.), rev'd. and remanded 45 N.Y. 2d 894, 383 N.E. 2d 560 (1978, N.Y.)—regulation worked temporary taking. *Gordon* v. *City of Warren*, 579 F.2d 386, 387 (1978, 6th Cir.)—temporary taking. *Jones* v. *People*, 22 Cal. 3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 (1978)—regulation worked temporary taking of access. *City of Austin* v. *Teague*, 570 S.W. 2d 389 (1978, Tex.)—regulatory activity worked a temporary taking; out-of-pocket losses compensated. Accord, *San Antonio River Authority* v. *Garret Bros.*, 528 S.W. 2d 266 (1975, Tex. Civ. App.).

[17] *Sneed* v. *County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963)—regulation effected taking of easement.

[18] *Benenson* v. *United States*, 548 F.2d 939 (1977, Ct. Cl.), *Drakes Bay Land Co.* v. *United States*, 424 F.2d 574 (1970, Ct. Cl.) and 459 F.2d 504, 505 (1972, Ct. Cl.).

ing of regulations so as to meet at once the desirable goals of accomplishment of basic regulatory objectives (albeit possibly not to the degree that may be desired by community environmentalist zealots; see Frieden, "The Environmental Protection Hustle" (1979, MIT Press), *passim*), while still affording protection to the rights of the regulated (see *U.S. Trust Co.* v. *New Jersey, supra,* 431 U.S. at 29-30). In contrast, the kind of rule sought by Appellee, that would allow an irresponsible governmental entity to have a go at confiscatory regulation, without fear of meaningful adverse consequences, save only an occasional judicial word of disapproval which might momentarily hurt the municipality's pride but leave it free to "regulate" anew (see *infra,* fn. 20), would be a positive disincentive to responsible governmental conduct.

Moreover, a finding of monetary liability, subject to such fiscally ameliorative measures would have the wholesome effect of removing the crushing burden of delay and uncertainty from the afflicted landowners (see *e.g.,* the travails of the landowner in *William Haas Co.* v. *San Francisco,* 605 F.2d 1117, 1119 (1979, 9th Cir.), while allowing the regulating entity a rational basis on which to assess, discount and forecast its exposure, and thereby reach informed and decisive cost/benefit conclusions when it sets out to impose onerous property regulations in pursuit of its democratically established social benefit goals.

F. Just Compensation Needs to be Retained as a Remedy Because Invalidation is Often Ineffective and is De Facto Not Available in California.

Only a few jurisdictions follow the rule of ordering that the owner be allowed to proceed with his project upon a showing that the challenged regulation is invalid (see *e.g., Sinclair Pipeline Co.* v. *Village of Richton Park,* 167 N.E. 2d 406, 411 (1960, Ill.). California, however, is *not* one of those jurisdictions. Not only does invalidation in California

mean that the supposed "victor" has to face his adversaries as adjudicators on remand, but that state's law goes even further. It grants the regulatory agency a *carte blanche* to simply change the regulation at any time, even while its validity is being litigated, or even after it has been found invalid.[19] Such a rule has manifest potential for abuse, and this has been unblushingly noted by municipal lawyers.[20]

It is a familiar phenomenon in California that a landowner who applies for a permit to use his land, in short order finds himself facing a flurry of changes in the local land use regulation scheme, transparently calculated to frustrate him. See *Toso* v. *City of Santa Barbara,* 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), *Wm. C. Haas & Co.* v. *San Francisco,* 605 F.2d 1117 (1979, 9th Cir.).

Thus, it hardly comes as a surprise that there have been no reported invalidation cases [on grounds of taking] reported in California in almost two decades; the last one was *Hamer* v. *Town of Ross,* 59 Cal. 2d 776, 31 Cal. Rptr. 335, 283 P.2d 376 (1963).

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[19] Thus, a California landowner may find himself challenging a blatantly illegal regulation in court, only to discover that even as he is about to prevail, the regulation is changed, and he has to start all over again. See *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 125, 109 Cal. Rptr. 799, 809, 514 P.2d 111 (1973).

[20] "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby* v. *City of San Buenaventura,* 10 Cal.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

Invalidation of overreaching land use regulations is often also an illusory remedy, because typically, a judgment of invalidation is followed by remand to the regulatory agency for reconsideration. This makes the process wholly dependent on the agency's good faith; or, it is like remanding the chickens to the care of the fox, with an admonition that he ought to be nicer this time. So far, only one state has formulated a clear rule that requires the regulatory agency to make it clear to the landowner what uses will be permitted, so that his permit application can be directed to realistic objectives,[21] instead of the all-too-common process of spending a fortune on plans and administrative proceedings that in the end produce a high-handed rejection of the tenor that we-don't-like-*this*-plan-but-perhaps-we-may-like-another.[22]

CONCLUSION

In the final analysis, both logic and human experience teach that societies can retain their attributes of freedom only when individual property rights are respected along with other human rights. The two are intertwined, and "[n]either could have meaning without the other". (*Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 552).

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[21] See *Spears* v. *Berle,* 422 N.Y.S. 2d 636, 640, fn. 4 (1979).

[22] Lest the Court think this concern hyperbolic, please note that in *Penn Central,* the landowner went through *three* building designs by Marcel Breuer, only to be turned down (see 438 U.S. at 116-118). Query: how many landowners can even begin to bear the likely expense of such endeavors? *A fortiori,* how many can do so when faced with a hostile regulatory body? Such excesses are by no means limited to affluent landowners; they can also be visited on "the little guy"—see *Brecciaroli* v. *Comm. of Environmental Protection,* 362 A. 2d 948 (1975, Conn.).

The government which is free to exercise unbridled power over its citizens' material wellbeing is for all practical purposes a government possessed of tyrannical powers, that has little need to impinge overtly on those citizens' other rights. A citizen who knows that his material security can be snuffed out by costly "regulations" is not likely to espouse unpopular views.

History also teaches that one simply cannot expect governmental power to restrain itself; the accuracy of Lord Acton's aphorism about the corrupting effects of power has been demonstrated time and again, with depressing reliability. Thus, to provide meaningful restraints on abusive growth of governmental power, the remedy afforded to aggrieved citizens must be effective. In the final analysis, the disincentive to wrongful conduct that money damages provide is appropriate and socially wholesome—especially in the context of egregious deprivation of constitutional rights.

The case at bench thus brings to the Court another instance suitable for invocation of the concepts of checks and balances. Here as elsewhere, a profession of noble ends should not serve as justification for employment of unconstitutional means. A government that would respond only to the self-serving call of politically popular, trendy notions abroad in its constituency, must still heed the stern call of accountability to the Constitution. In other words, popular cries uttered in the name of the environment, cannot, anymore than similar cries for "law and order", undo the idea that the Constitution and the rights protected by it—*including the rights of property*—are the supreme law of the land.

Amicus curiae respectfully urges that the judgment below be reversed.

Respectfully submitted,

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